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MILITARY SUPPORT TO LAW ENFORCEMENT AND POSSE COMITATUS:
IS THE SEARCH FOR NONTRADITIONAL MISSIONS ON A COLLISION
COURSE WITH OPERATIONAL READINESS?

by

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College, the Department of the Navy, or the United States Air Force.

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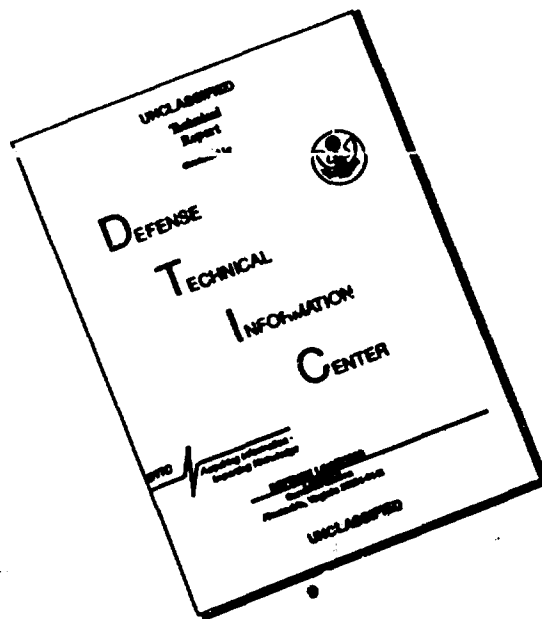
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"A democracy has to be reminded over and over again that freedom can never be taken for granted, and military preparedness is the only guarantee."

Gen. Jimmy Doolittle¹

CHAPTER I

INTRODUCTION: WHY THE RUSH TO FIND NONTRADITIONAL MISSIONS?

The long-awaited end of the Cold War has arrived, and the U.S. could claim "victory." The threat of superpower conflict was an image the United States would no longer have to face. Life should be simpler for those charged with national security planning, designing a force structure adequate to the "New World Order," and drafting a national budget that reflects changing priorities and a final answer to the "guns vs. butter" debate.

Unfortunately, life has not turned out to be so simple. Potentially dangerous conflicts, such as the resurgence of ancient ethnic animosities, provide potential threats to U.S. interests. As Admiral Leon Edney, Commander-in-Chief Atlantic Command, observed, "It is still a dangerous world out there. No one has to create imaginary threats to peace and our security interests."² New threats loom on the horizon, complicating planning and force structuring. The ever-shrinking defense budget necessitates a yet-undefined "draw-down," even though the economic effects of Department of Defense down-sizing and cancelled or reduced defense contracts are complicating the ability of the "peace dividend" to overcome the social ills of

the nation in yet-unrecognized ways. Is it hard to imagine why we may one day have feelings of nostalgia for the certitudes of the Cold War era?³.

Even with the popular victory of Operation Desert Storm, fear that the down-sizing will render the U.S. military a "hollow" force⁴--insufficient for the possible contingencies of the future⁵--haunts defense planners. In the face of shrinking budgets and mandated reductions in manpower and procurement, the military services are searching for new roles and missions to support the retention of some semblance of our present military capabilities and structures. This search is seemingly without bounds, as "nontraditional roles and missions" has now become a buzz word in the halls of both Congress and the Pentagon,⁶ even though DoD's attitude is in stark contrast to its attitudes of only a decade ago, when "[DoD] wanted nothing to do with nontraditional . . . missions."⁷ Just as any budget cut may look good on paper if the goal is only budget reduction, so any new mission may sound good if the result is retaining a familiar force structure. Thus, voices are heard that urge a fundamental change in how America views her military services. Military assistance to civilian government and the domestic policy agenda seems to be just the answer to these fears and is presented as a fitting role for the military. Both the Army Plan and TRADOC Pamphlet 525-5, for example, list domestic and civilian assistance roles BEFORE national security when discussing the Army's role in the post-Cold War era.⁸

It is the thesis of this paper that the operational (that is, wartime) readiness of our armed forces may be endangered by assigning to them "nontraditional" peacetime roles and missions that will not support needed wartime skills. This paper will address the search for nontraditional missions by focusing on one of the more well-known proposals--Military Support to Law Enforcement (MSLE)--and its possible effect on operational readiness. Although other suggested mission areas will be mentioned where appropriate, MSLE is emphasized because it has been so prominent in the War on Drugs and, most recently, in planned military assistance to the U. S. Customs Service and the Immigration and Naturalization Service. The search, we will see, is not even limited to support of FEDERAL law enforcement agencies. In a case of "form over substance," there have been serious suggestions that active-duty military personnel work in local law enforcement agency precincts, to free up civilian police officers for street duty!⁹

Avoiding the obvious question of whether local police officials would really welcome military personnel working in their offices with access to their files,¹⁰ we are concerned with the more crucial question of whether such employment of military forces contributes to, or actually detracts from, operational readiness, in other words, whether the search for nontraditional roles and missions is driven by an appreciation of the long-term implications of such employment, or merely by the short-term justification of a desired force structure. We will see that the

fear of down-sizing, of becoming a "hollow" force, and of losing the support--moral and budgetary--of the American people, seems to be driving the rush to take on any possible mission that can support a familiar force structure. The danger, of course, is that there is insufficient attention to what these new roles will do to our ability to respond to the unknown threats and contingencies of the future. There are also legal issues that impinge on some basic concepts of American democracy, which further attests to the short-sightedness of many of these proposals.

Recent changes to the "obscure and all-but-forgotten"¹¹ Posse Comitatus Act,¹² which has historically kept military forces from being used in support of civilian law enforcement, make it abundantly clear that this is not just an academic question. There are other laws that have prevented military involvement in several non-law enforcement areas, and if Posse Comitatus can easily be changed to allow expanded military involvement in civilian law enforcement, should we not expect that other legal deterrents will also be removed? These are crucial issues, as the uniqueness of the American form of government and the operational readiness of our armed forces are both intimately tied to the kinds of peacetime missions to which our forces will be assigned.

"Nothing in this chapter shall be construed to limit the authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes beyond that provided by law before December 1, 1981."

10 U.S.C. §378

CHAPTER II

POSSE COMITATUS: LEGAL LIMITS TO MILITARY SUPPORT

POSSE COMITATUS: ITS ORIGIN

The historic American fear of a strong military and its potential for usurping power over the citizenry is as old as our experiment with democracy. Reflecting our colonial experience under the British (as expounded in the Declaration of Independence), the Articles of Confederation limited federal government power by retaining for the states all powers not specifically granted to the central government, and by guaranteeing state sovereignty. "The Articles of Confederation reflected both civilian control of the military and a preference for the farmer in arms as a member of the militia over the standing professional army."¹³ Although recognition of the weaknesses of the government established by the Articles soon led to the adoption of the Constitution, this fear of a strong, central government was carried over into the Bill of Rights (the first ten amendments to the Constitution), for the experiences

of abuses of the American colonists by the British military were still fresh in the drafters' minds.¹⁴

For philosophical and geopolitical reasons, the practical demonstration of the lack of American enthusiasm for the military was the failure of the nation to maintain adequate military strength. One prime example of this was the status of military preparedness at the beginning of the Civil War, even though the Mexican War had occurred only thirteen years prior.¹⁵ Yet the desire to efficiently enforce the laws of the land in the post-Civil War South led to an unanticipated use of military personnel to assist U. S. Marshals.

The Judiciary Act of 1789 had given U. S. Marshals the authority to "command all necessary assistance in the execution of [their] duty."¹⁶ This legislation, the first posse comitatus (Latin for "power of the county") act in the United States, was superseded by another act in 1792,¹⁷ which specified that the militia¹⁸ (state "citizen army" personnel, rather than federal troops) could be utilized to assist the marshal in certain circumstances. Over time, the distinction was forgotten or ignored, and regular military personnel were called upon to assist the marshals. Interestingly, however, "when military personnel were called out to serve in a posse, they were considered to be performing the duty of all adult citizens to respond to the marshal's call,"¹⁹ as was confirmed in Attorney General's Opinions in 1854 and 1860. In the 1854 opinion, Attorney General Caleb Cushing declared that:

[T]he posse comitatus comprises every person in the district or country above the age of fifteen years, whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of the sheriff or marshal. The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still the posse comitatus.²⁰

This was the situation immediately before the Posse Comitatus Act as we know it today, although there were unsuccessful attempts during the pre-Civil War years to forbid the use of military forces in the enforcement of civilian law.

During the Reconstruction years, federal troops were routinely used to enforce the laws, with the Reconstruction Act of 1867 supporting military rule in the states of the former Confederacy.²¹ Federal troops were also used by federal and local officials for purposes unrelated to the recent secession. However, after all of the Confederate states were readmitted to the Union, and the return of two-party politics in the South allowed the Democrats to regain control of the House of Representatives, the issue of military involvement in civilian law enforcement became a major issue. After several attempts, a Democratic House and a Republican Senate agreed on the following wording, which became the law of the land in 1878:

From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and

under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress, and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding \$10,000 or imprisonment not exceeding two years or both such fine and imprisonment.²²

The original wording has remained to this day, except for the 1956 addition of the Air Force, which had previously been included under the Army. It is beyond the scope of this paper to inquire as to why the Navy and the Marine Corps were not included, but that is almost a moot issue in two respects: First, some would hold that "the apparent intent of the Act was always to prohibit the use of military forces of any kind in civilian law enforcement. The implication, therefore, was that the restriction applied to naval forces,"²³ as well as the Army and Air Force. Secondly, the Navy has unilaterally applied the Act to itself in a Secretary of the Navy Instruction, while admitting that the act did not explicitly name the Navy.²⁴ The U.S. Coast Guard, an armed force within the Department of Transportation with very broad statutory law enforcement functions, is also not covered by the Act, even when it is serving as a part of the U.S. Navy during wartime or when the President so directs.²⁵

With the threat of criminal penalties,²⁶ personal civil liability, and the possibility of courts excluding evidence obtained through forbidden military involvement,²⁷ the original Posse Comitatus Act has proven effective in removing any image

of the armed forces as a police force,²⁸ as is so often the case in the Third World. This is not to say, however, that there are not incidental law enforcement powers given to the military in legislation that meets the Act's exception of express constitutional or congressional authorization; the list of law enforcement-related duties to which the military may be called is actually quite large.²⁹ The point is that the Act was occasioned by a chain of events that made the Army more of a police force than an armed force, so that, in the words of a congressman of that era, "[O]ur Army, degraded from its high position of the defenders of the country from foreign and domestic foes, has been used as a police."³⁰

This is the danger we face today as restrictions upon military involvement are loosened. The nation's inward focus and desire for more efficient enforcement of federal and state criminal statutes makes involvement of the armed forces tempting. Add to this need of the military services to find roles and missions that will justify force structures, and we have a situation in which the legislative exceptions are not merely incidental, short-duration, law enforcement authority, but long-range, primary law enforcement missions, with possible detrimental effects on the operational readiness of individual units and the combatant commands.

RECENT CHANGES IN THE LAW

The objective of the Act may have been met too well in the years since its adoption, as ambiguities and misinterpretations

of the Act resulted in an ironic situation. The Posse Comitatus Act was being used by military commanders to deny "aid [to local communities], even when such assistance would be legally proper."³¹ In other situations, it was improperly claimed as the justification for denying aid that would have been illegal under other constitutional principles or legislation, such as aid to religious organizations.³² Rectification of this situation led to major expansions of the legislative exceptions to the Act, beginning in 1981, when Congress codified several court interpretations of Posse Comitatus in 10 U.S.C. §§371-378, the "Military Cooperation with Civilian Law Enforcement Officials Act."

The act detailed such permissive actions as sharing information collected during military operations (and the requirement to take law enforcement needs into consideration when planning operations) (§371), allowing the use of military facilities and equipment by civilian law enforcement agencies (CLEAs) (§372), training and advising civilian law enforcement officials (§373), and allowing military personnel to operate or maintain equipment for CLEAs (§374). In certain of the expansions, military assistance was limited to federal law enforcement agencies. However, the Act did reiterate Posse Comitatus by forbidding "direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless . . . authorized by law" (§375).

In 1988, these sections were further amended, in time for the Bush Administration's National Drug Control Strategy. Proposals for additional changes to what is now called "Military Support for Civil Law Enforcement Agencies" (Chapter 18 of Title 10 U.S.C.) have been introduced into the 103rd Congress. H.R. 245 and H.R. 1017 have been submitted by Rep. McCandless and Rep. Traficant, respectively, and would amend Title 10 "to authorize the detail of personnel of the Department of Defense to assist the Immigration and Naturalization Service and the United States Customs Service perform border patrol-related activities."³³ As the legal impediments to military involvement in civilian law enforcement continue to fall, one is led to question if the primacy of the wartime mission and the national security role of the military will become lost in seeking to solve the mutual needs of the military for new missions and the civilian community for assistance in solving criminal threats to its peace and safety.

"The end for which a soldier is recruited, clothed, armed, and trained...is simply that he should fight at the right place and the right time."

--Carl von Clausewitz³⁴

CHAPTER III

OPERATIONAL EFFECTIVENESS: ENHANCED OR DAMAGED?

NEW MISSIONS MUST CONTRIBUTE TO READINESS

Without a clearly visible external threat to the U.S., it is not difficult to understand why local government officials and individual taxpayers alike would see the armed forces as a logical source of assistance to the local community, especially in the area of crime. Likewise, to someone only interested in justifying the retention of our current force structure, manpower-intensive law enforcement missions make sense. However, America's concern must be the effect on the readiness of military forces to accomplish their primary (wartime) mission. To have the military become a police force with an internal orientation was one of the fears that led Congress to pass the Posse Comitatus Act in 1878. Besides the obvious constitutional and civil rights issues that would naturally support this fear, given our American political experience, a more practical issue was involved: military readiness to do its primary function. Even a civilian legal analyst, in addressing early justification for using military personnel as a posse comitatus, was led to observe:

It seems incongruous that the posse comitatus doctrine should have empowered the sheriff to take command of the King's soldiers for purposes of local law enforcement...without regard for the plans of the King and his military commanders for the overall defense of the realm.³⁵

A 1990 warning to the CINCs remains applicable to today: "No one can predict exactly where, or for what, your all-service forces will be used. But you are responsible for having them at high readiness for whatever they are called upon to do."³⁶ Today's combatant commander may not be faced with the prospect of receiving a JCS Execute Order, only to find that the troops he had planned to use are with the county sheriff or the U.S. Marshal arresting a fugitive or serving civil papers. Rather, the commander's real fear should be that the readiness of his forces is reduced because they have been assigned ancillary missions that have failed to keep his forces prepared for their primary mission. Both the 1981 and 1988 versions of the legislation on Military Support to Law Enforcement apparently recognized the negative effect that these new missions could have on operational readiness. 10 U.S.C. §376 states,

Support (including the provision of any equipment or facility or the assignment or detail of any personnel) may not be provided to any civilian law enforcement official under this chapter if the provision of such support will adversely affect the military preparedness of the United States. The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that the provision of any such support does not adversely affect the military preparedness of the United States.

Training in and exercising wartime skills are essential requirements for any military unit. Since what one does from day to day in peacetime is really training for wartime skills, it impacts how units and individuals, alike, will react and perform in the stress and tempo of battle. Therefore, anything that detracts from realistic training will be counter-productive and have a negative effect on preparedness.

Peacetime missions, then, must be seen as training experiences for combat and opportunities for military personnel and units to hone the skills that may mean the difference between life and death, victory and defeat. This, of necessity, is irrespective of the good they do--the "peace dividend" they provide--for the nation as a whole or for the local civilian community. In accepting peacetime missions, our priorities must be right and reflect the realities of the primary tasks that must be accomplished all along the spectrum of conflict. But what kind of "nontraditional missions"³⁷ do we hear being proposed for our armed forces today?

Crime problems, social ills, and the nation's aging physical infrastructure have provided most of the focus for those who are suggesting or lobbying for additional missions for the armed forces. The FY 1989 National Defense Authorization Act assigned to DoD responsibilities as the lead federal agency for detection and monitoring of air and sea smuggling of illegal drugs into the U.S. Even though the efficiency of DoD's participation has been hotly contested, even greater degrees of

participation have been suggested by congressmen.³⁸ Legislation introduced into the current (103rd) Congress, relating to military assistance to the U.S. Customs Service and the Immigration and Naturalization Service, reflect this trend. But suggestions run the gamut, including administrative augmentation of state and local police departments.

There have also been suggestions that DoD take over management of federal disaster response from the Federal Emergency Management Agency (FEMA), after 1992's experience with multiple hurricanes and other disasters.³⁹ Even though DoD has religiously exempted Military Support to Law Enforcement from its historic emergency management terminology of Military Assistance to Civil Authorities (M.A.C.A.) and the new Military Support to Civil Authorities (M.S.C.A.) draft directive,⁴⁰ emergency management is a law enforcement mission in many of our western states, a function of the county sheriff's office. Indeed, utilization of military personnel in disaster areas usually includes anti-looting and physical security operations.

In the purely non-law enforcement arena, the serious infrastructure problems that face the U.S. give rise to many of the suggested missions that might be assigned to the armed forces. Repair of unsafe roads and bridges and aged school buildings is proposed as a mission for military civil engineering units; Air Force Rapid Runway Repair ("Triple-R") teams would appear to be ideal to make repairs to the Interstate Highway System. Inequities in healthcare delivery would provide

a natural opportunity for armed forces medical personnel to utilize their skills in peacetime,⁴¹ especially in inner-city hospitals, where gang violence-related injuries are very similar to those encountered in combat. Listings of such potential missions sometimes seem blatantly naive, as many of these missions carry with them their own legal baggage in the form of federal laws (such as those against the use of military personnel or equipment in competition with civilian businesses) and existing union or service contracts. Brehm and Gray recognize these "roadblocks," but feel they can be overcome.⁴² Still, from an operational standpoint, the question remains--Do those missions contribute to or detract from operational readiness?

MUTUALLY BENEFICIAL MISSIONS?

There must be a way to qualitatively evaluate potential missions (or which units to assign to them) on the basis of how they will affect operational readiness. Relating to types of units or job specialties, Brehm and Gray give one method when they differentiate between "combat maneuver forces [which] must be trained for war" and "support forces [which] can conduct peaceful, noncombatant missions while also developing and maintaining skills required for combat operations."⁴³ However, focusing on "combat" versus "support" may not go far enough. For example, if Army Military Police or Air Force Security Police personnel were acceptable to local law enforcement agencies and were assigned to those agencies to handle

administrative details, would this really ready them for wartime duties? It is hard to imagine how office work (that is, tasks that do not violate Posse Comitatus and Title 10 prohibitions against direct participation by military personnel in "search, seizure, arrest, or similar activity"⁴⁴) will train these personnel in the sort of skills they need to be better law enforcement personnel on the base in peacetime, let alone in a theater of war. The same could be said if the Rapid Runway Repair teams, mentioned above, were assigned peacetime duties paving school playgrounds or parking lots; the wartime skill would not be enhanced and could, in fact, be lost. A potentially more serious situation occurs when the difference between combat Rules of Engagement (ROEs) are compared to those applicable to domestic law enforcement; in a stressful situation (in a theater of operations or during a domestic law enforcement mission), the result of ROE confusion could be fatal--to the soldier or to civilians.⁴⁵

The danger to loss of skill was aptly portrayed in the award-winning National War College essay by Lt Col Charles Dunlap.⁴⁶ Although fiction, the essay must be taken seriously in its message that "These additional assignments also had the perverse effect of diverting focus and resources from the military's central mission of combat training and warfighting."⁴⁷ Dunlap had a historical example in mind when he penned this, for, as military analyst Harry Summers notes, pre-World War II "senior Canadian officers sought out civilian missions to

justify their existence. When war came, they were woefully unprepared."⁴⁸

The involvement of the military in anti-drug operations is a case in point. While not underestimating the seriousness of the nation's drug problem to our national security and the necessity to use whatever resources that can be mustered in a "war" to stem the flow of illegal drugs into the U.S., we must look at the effect these operations have on forces upon which the theater commander will depend in time of war. Dunlap mentions the crews of AWACS aircraft and naval tracking platforms, who lost their skill in tracking high-performance aircraft or submarines when their "quarry" were only slow-moving civilian planes and ships.⁴⁹ This is not necessarily fiction; in fact, it stands to reason that skills cannot be honed in artificial environments, and the types of targets that are tracked in the drug war are "artificial" when compared with those that would be encountered in a combat situation. It is not necessarily true that "private sector . . . support . . . equates to training readiness"⁵⁰ or that "Their training [will be] their work and vice versa."⁵¹ Such thoughts are much like those expressed by advocates of total off-the-shelf purchases of equipment for the military--they do not recognize the inherent differences between military responsibilities and civilian tasks.

As Dunlap, through the medium of fiction, makes clear, the nontraditional, ancillary missions that have been assigned to

the armed forces, or that are now being proposed have been sold as being as much training for combat as they are beneficial to the nation.⁵² This understandably elicits much positive response, for the military is acutely concerned about training. Gen. McPeak, the Air Force Chief of Staff, recently declared "The Year of Training,"⁵³ to emphasize that the mission of the service to "organize, train, and equip." Operational (combat) training has an objective--to prepare servicemen and women for their wartime duties. Since these duties will be with the combatant commands, the CINCs should be especially interested that peacetime training missions support wartime requirements.

ANCILLARY MISSIONS OR DEDICATED FORCES?

It is understandable that, during peacetime, when there is no identifiable enemy or threat, citizens and governmental leaders alike will look to the military to solve the major problems facing our nation. The armed forces, after all, appear to have the very sorts of skills, manpower, and specialized equipment needed to solve pressing problems. And when local government budgets cannot handle the costs, the military appears to be an answer that comes without cost (forgetting that EVERYONE'S taxes pay for the military). But it is also understandable that military planners will seek force structures that will allow the United States to respond to the myriad of plausible ("worst case") scenarios that still face us in the New World Order. Since budgetary constraints and competing national priorities will limit expenditures and programs that are purely

military, both sides will seek domestic missions for the armed forces. The question is how to do them without negative impact on mission readiness.

The answer to our concerns seems to lie in a distinction between what additional missions can be assumed that will not detract from operational readiness and those that will, rather than a simple yes or no to the concept of nontraditional missions. Some of the proposed missions, admittedly, can provide valuable combat-related training, while others do not. Those that do not, if important enough, will need to have their own dedicated equipment and personnel--that is, an increase in force structure, as unlikely as this appears with today's shrinking budget. Whether this increase will find itself listed in the defense budget or elsewhere (e.g., equivalently trained and equipped civilian personnel, such as Drug Enforcement Administration [DEA] personnel flying DEA-owned mini-AWACS aircraft), the fact is that operational readiness requirements must come first and not allow combat skills to be wasted doing qualitatively unrelated duties. If this means additional military personnel, then the goal of those fighting to retain an appropriate level of force structure will have been met. If, however, the funding goes to a civilian agency, the issue of nontraditional missions may be rendered moot.

There will always be ancillary missions that the military will perform. Disaster relief, such as federal assistance in the wake of Hurricane Hugo, is one example. Another is civil

disturbance (riot control) operations, such as the response to the Los Angeles Riots in 1992 under GARDEN PLOT (the Department of Defense Civil Disturbance Plan). These categories require large numbers of personnel and certain types of equipment, rather than specific law enforcement training. They are appropriate because they occur infrequently and do not require the long-term commitment of forces. Likewise, Presidential (and candidate) Protection duties are periodic and of short duration. But any enforcement of state or local laws or augmentation of local police agencies would not only entail potential Posse Comitatus violations, but would add nothing to skill level of military police personnel--for peacetime, let alone wartime. The same is true for the myriad of other domestic social, economic, and environmental problems that allegedly should be solved by utilizing the armed forces.

"Operational art includes recognizing inappropriate military objectives."⁵⁴

CHAPTER IV

CONCLUSION: KEEPING THE FOCUS ON THE MISSION

In establishing the Weinberger Doctrine as a paradigm for evaluating possible domestic missions for the military, Colonel James Cathcart notes, "'The Threat' . . . drives military strategy, force structure, and doctrine. More and more . . . the public sees the Threat as internal instead of external."⁵⁵ Segments of the military, however, appear to see a diminishing force structure as an equally fearful threat. To justify a size that will prevent the "hollow" military forces previous draw-downs have experienced, the search is on for nontraditional roles and missions. Whether the proposed missions are really so nontraditional is a question for the historians to address,⁵⁶ but the pressure is on from both civilian and military quarters for the armed forces to take on missions that have little relationship to wartime duties. In looking at this problem I have focused on Military Support to Law Enforcement, because it has been the most publicized of the potential mission areas. The same arguments, however, could be proposed for other areas of possible military involvement.

Historically, the Posse Comitatus Act has prevented the military from becoming involved in civilian law enforcement. Ambiguities in Posse Comitatus led to a broadening of

legislative exemptions to its provisions; this broadening has continued as the military has been assigned key roles in the nation's drug war and, apparently, will soon be significantly involved in U.S. Customs and Immigration operations. From some quarters, we even hear cries to expand military assistance to local law enforcement.

Expanded military involvement in civilian law enforcement is an example of a peacetime utilization of the military that may reduce the combat effectiveness of the very forces upon which the theater commander will depend in time of war. The desire to find missions to justify a certain force size or structure may lead to "a disconnect between the U.S. military's readiness, doctrine and military education and the missions it was actually called upon to accomplish--a disconnect that often led to early disasters in the majority of our wars."⁵⁷ Operational level commanders, who must insure that strategy and tactics are properly linked, are most likely to feel the result on combat effectiveness of unwise peacetime missions. Therefore, these commanders should be the most vocal in ensuring that the dangers of unwise mission acceptance are avoided. Just as we expect our strategists to inform the national leadership when there is a Strategy-Policy Mismatch, so the operational-level commanders would appear to be in the ideal position to objectively identify ancillary missions that would negatively impact operational capabilities. Indeed, as Richard Gabriel wrote in his book To Serve with Honor, "The soldier fails to

live up to his oath to serve the country if he does not speak out when he sees his civilian or military superiors executing policies he feels to be wrong."⁵⁸

The security of the United States demands that our litmus test in peacetime mission assignment be its effect on the wartime mission, not just a desire to maintain a certain force level or a philosophical approach to solving the nation's domestic problems. There is no guarantee that this present period of peace will remain, therefore the operational commander must be assured of having skilled personnel available when the execution order is received--whatever the threat. He cannot worry about whether a disconnect between operational readiness and peacetime domestic missions has sapped the skills of those units and individuals on whom he depends to execute his plans.

This is a time when America is looking inward, desirous of spending less on external defense and more to solve our social and infrastructure problems. A tradeoff between domestic missions and force maintenance may seem logical. But it takes boldness to buck public opinion and shallow answers to complex problems. We need that boldness to recognize and to articulate that the "peace dividend" cannot be spent at the expense of operational readiness. The wartime mission of the armed forces--leading to duties that are "indisputably military duties"⁵⁹--must ever remain our focus.

ENDNOTES

CHAPTER I

1. Department of the Air Force, Policy Letter from the Office of the Secretary of the Air Force, AFP 190-1 (Washington: 1993), p. 1.
2. Quoted in L. Edgar Prina, "Navy Moves 'All Ahead Flank' in Mine Warfare," Sea Power, May 1992, p. 34.
3. John J. Mearsheimer, "Why We Will Soon Miss the Cold War," Naval War College Force Planning Faculty, ed., Fundamentals of Force Planning: Vol. II, Defense Planning Cases (Newport: Naval War College Press, 1991), p. 166.
4. Mai Hoffman, "Avoiding a 'Hollow' Military--Precedents and Prescriptions," Marine Corps Gazette, May 1992, pp. 40-43.
5. For an Air Force perspective to this concern, see David A. Fulghum, "Force Drawdown Limits U.S. Ability to Fight Dual Conflicts," Aviation Week & Space Technology, April 6, 1992, pp. 18-20.
6. Telephone conversation with Maxwell Alston, Deputy Director for Emergency Planning, Office of the Deputy Undersecretary of Defense (Security Policy), Washington, DC, 7 October 1992.
7. Interview with Eugene M. Pinkelmann, Jr (CDR, JAGC, USN), Operations Department, Naval War College, Newport, RI: 7 May 1993.
8. Department of the Army, The Army Plan (S) (Washington: 1991), p. 4, and Department of the Army, Airland Operations: The Evolution of Airland Battle for a Strategic Army (Final Draft), TRADOC PAM 525-5 (Washington: 1991); both cited in Philip A. Brehm and Wilbur E. Gray, Alternative Missions for the Army (Carlisle Barracks, PA: Strategic Studies Institute. U.S. Army War College, 1992), p. 10.
9. David E. Shaver (Col, USA), Justifying the Army (Carlisle Barracks, PA: Strategic Studies Institute, 1990), pp. 28-29.
10. Even the much-heralded civilian "Police Corps" proposal of President Clinton has failed to receive positive response from civilian police executives. See Steven R. Harris (President, International Association of Chiefs of Police), "The Myth of the Police Corps," The Police Chief, February 1993, p. 6.

11. Chandler v. United States 171 F.2d 921, 936; quoted in James P. O'Shaughnessy, "The Posse Comitatus Act: Reconstruction Politics Reconsidered," The American Criminal Law Review, vol. 13, p. 703.

12. Title 18, United States Code, Section 1385; the Code will hereafter be cited as with the number of the Title, followed by the abbreviation U.S.C., then followed by the Section number.

CHAPTER II

13. Charles Doyle, "Use of the Military to Enforce Civilian Law: Posse Comitatus Act and Other Considerations," Unpublished Research Paper (#88-583 A), Congressional Research Service, Washington, DC: 1988, p. 2.

14. Clarence I. Meeks III (Maj, USMC), "Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act," Military Law Review, 1975, p. 88.

15. Prof. Richard A. Megargee and Prof. John D. Waghelstein, Lectures, U.S. Naval War College, Newport, RI: nd.

16. Act of Sept. 24, 1789, ch. 20, §27, 1 Stat. 87, quoted in Meeks, Ibid.

17. Act of May 2, 1792, ch. 28, §9, 1 Stat. 265.

18. For a history of the concept of the American militia, see William S. Fields and David T. Hardy, "The Militia and the Constitution: A Legal History," Military Law Review, Spring 1992, pp. 26ff.

19. Meeks, Ibid.

20. 6 Op. Att'y Gen. 466, 473 (1854); quoted in Doyle, Ibid., p. 5.

21. Act of March 2, 1867, ch. 153, 14 Stat. 428; cited in Meeks, Ibid., p. 89.

22. 7 Cong. Rec. 3845 (1878); quoted in Meeks, Ibid., p. 92, and cited in Doyle, Ibid., p. 7.

23. Michael R. Adams (LCDR, USCG), "The Role of the U.S. Navy in Domestic Law Enforcement," Unpublished Research Paper, U.S. Naval War College, Newport, RI: 1984, p. 6.

24. Secretary of the Navy, Posse Comitatus Act, SECNAVINST 5820.7 (Washington: 1982), p. 1.

25. U.S. Navy Department, The Commander's Handbook on the Law of Naval Operations, NWP 9 (Rev. A). Washington: 1989. 14 U.S.C. 1 made the U.S. Coast Guard an "armed force" within the Department of Transportation during peacetime, while 14 U.S.C. 3 places it within the Department of the Navy in time of war or when transferred by the President; see Doyle, pp. 16-17, where he states that although the Coast Guard's law enforcement power remains when it is part of the Navy, "it is subject to the orders of the Secretary of the Navy...and might be held bound by any posse comitatus instruction then in effect."

26. No one, to date, has ever been criminally prosecuted for a violation of the Act.

27. See Larry L. Bouche, "The Posse Comitatus Act as an Exclusionary Rule: Is the Criminal to go Free Because the Soldier has Blundered?" North Dakota Law Review, vol 61 (1985), pp. 107ff.

28. Considering how little case history applies specifically to the Act, it is almost miraculous that it has been so successful in shaping the behavior of military personnel in the face of what would normally be considered civic duty.

29. 10 U.S.C. §378, quoted at the beginning of this chapter, reads remarkably like a "catch-all" authorization for yet-unnamed law enforcement missions; for a complete listing, see Dept. of Defense, "DoD Cooperation with Civilian Law Enforcement Officials," DOD Directive 5525.5 (Washington: 1986), pp. 4-2, 4-3.

30. 5 Cong. Rec. 2117 (Remarks of Representative Banning); quoted in Doyle, p. 6.

31. House of Representatives Report, No. 97-71; quoted in Paul Jackson Rice (Col, USA), "New Laws and Insights Encircle the Posse Comitatus Act," Military Law Review, Spring 1984, p. 112.

32. Ibid.

33. Quotation from copies of the draft legislation; H.R. 245 was introduced on 5 January 1993; H.R. 1017 was introduced 18 February 1993.

34. Carl von Clausewitz, On War, eds. Michael Howard and Peter Paret (Princeton: Princeton University Press, 1976), p. 95.

Chapter III

35. Doyle, P. 5.

36. John H. Cushman (LtGen, USA), "Joint Command and Control," Military Review, July 1990, p. 26.

37. The argument has been made that many of the proposed peacetime missions for the armed services are really not so "nontraditional," but in fact have a definite historical root in early America. See Brehm and Gray, pp. iii, 1-4.

38. James A. Cathcart (Col, USMC), "'And That Goes for Domestic Wars Too!' The Weinberger Doctrine and Domestic Use of the Military," Unpublished Research Paper, U.S. Army War College, Carlisle Barracks, PA: 1989, p. 17.

39. Letter from Senator Barbara A. Milulski to Charles Bowsher, Comptroller General of the U.S., 3 September 1992.

40. Department of Defense, Military Support to Civil Authorities, Unnumbered Draft Directive (Washington: 1992), p. 1.

41. A list of possible military functions in the civilian community is given in Brehm and Gray, pp. 20-21; see also Shaver, p. 16, where he lists environmental cleanup, the drug war, research and development, and a catch-all category of "Domestic Policy Support Forces" (health, engineering, transport, police, and others) as possible mission gains for the U.S. Army.

42. Brehm and Gray, pp. 21-22.

43. Ibid., p. 20.

44. 10 U.S.C. §375.

45. See, for example, the ROEs for Joint Task Force Los Angeles and the Florida Civil Relief Operation.

46. Charles J. Dunlap (Lt Col, USAF), "The Origins of the American Military Coup of 2012," Parameters, Winter 1992-93, pp. 2ff.

47. Ibid., p. 4.

48. Quoted in Dunlap, Ibid, p. 13.

49. Ibid., p. 12. An alternate view, admittedly, is that tracking these "quarries" is very much training for the Navy's new emphasis on littoral warfare or the capabilities of potential adversaries at the lower end of the spectrum of conflict.

50. Shaver, p. 28.

51. Ibid., p. 29.

52. Dunlap, p. 12.

53. "The Year of Training," Policy Letter from the Office of the Secretary of the Air Force, AFRP 190-1, October 1992, p. 2.

CHAPTER IV

54. Clayton R. Newell (LTC, USA), "What is Operational Art?" Military Review, September 1990, p. 8.

55. Cathcart, p.5.

56. Brehm and Gray, pp. iii and 1.

57. John D. Waghelstein, "War: American Style," Syllabus, Joint Military Operations Course, Naval War College, Newport, RI: 1993, p. 4.

58. Quoted in Dunlap, Ibid., p. 15.

59. Ibid. p. 14.

BIBLIOGRAPHY

- Adams, Michael R. (LCDR, USCG). "The Role of the U.S. Navy in Domestic Law Enforcement." Unpublished Research Paper, U.S. Naval War College, Newport, RI: 1984.
- Belec, Marguerite E. (LCDR, USN). "Uphold and Defend the Constitution; In South Central Los Angeles?" Unpublished Research Paper, U.S. Naval War College, Newport, RI: 1993.
- Bergantz, Joseph L. (COL, USA). "Military Support of the National Drug Control Strategy." Military Review, June 1992, pp. 67-72.
- Bouche, Larry L. "The Posse Comitatus Act as an Exclusionary Rule: Is the Criminal to go Free Because the Soldier has Blundered?" North Dakota Law Review, Vol. 61 (1985), pp. 107-130.
- Brehm, Philip A. (COL, ARNG), and Gray, Wilbur E. (MAJ, ARNG). Alternative Missions for the Army. Carlisle Barracks, PA: Strategic Studies Institute. Army War College, 1992.
- Cathcart, James A. (Col, USMC). "'And That Goes for Domestic Wars Too!' The Weinberger Doctrine and Domestic Use of the Military." Unpublished Research Paper, U.S. Army War College, Carlisle Barracks, PA: 1989.
- Clausewitz, Carl von. On War, eds. Michael Howard and Peter Paret. Princeton: Princeton University Press: 1976.
- Cushman, John H. (LT GEN, USA). "Joint Command and Control." Military Review, July 1990, pp. 25-34.
- Department of the Air Force. Policy Letter from the Office of the Secretary of the Air Force, AFRP 190-1. Washington: October 1992.
- _____. Policy Letter from the Office of the Secretary of the Air Force, AFRP 190-1. Washington: January 1993.
- _____. Policy Letter from the Office of the Secretary of the Air Force, AFRP 190-1. Washington: March 1993.
- Department of Defense. DoD Cooperation with Civilian Law Enforcement Officials. DoD Directive 5525.5. Washington: 1986.
- _____. Military Support to Civil Authorities. Unnumbered Draft Directive. Washington: 1992.

Donovan, James A. (Col, USMC). "Mission-Law and Order." Marine Corps Gazette, August 1992, pp. 42-44.

Doyle, Charles. "Use of the Military to Enforce Civilian Law: Posse Comitatus Act and Other Considerations." Unpublished Research Paper, Congressional Research Service (#88-583 A), Washington: 1988.

Dunlap, Charles J. (Lt Col, USAF). "The Origins of the American Military Coup of 2012." Paraseter, Winter 1992-93, pp. 2-20.

Fields, William S., and Hardy, David T. "The Militia and the Constitution: A Legal History." Military Law Review, Spring 1992, pp. 1-42.

"Florida Civil Relief ROE--Rules of Self-Protection and Rules of Engagement." Reprint for Elective Course in Rules of Engagement, U.S. Naval War College, Newport, RI: 1993.

Fulghum, David A. "Force Drawdown Limits U.S. Ability to Fight Dual Conflicts." Aviation Week and Space Technology, 6 April 1992, pp. 18-20.

Gates, John D. "Don't Call Out the Marines: An Assessment of the Posse Comitatus Act." Texas Tech Law Review, Vol. 13, pp. 1467-1493.

Harris, Steven R. "The Myth of the Police Corps." The Police Chief, February 1993, p.6.

Hoffman, Mai. "Avoiding a 'Hollow' Military--Precedents and Prescriptions." Marine Corps Gazette, May 1992, pp. 40-43.

Interview with Prof. David Chandler, Operations Department, Naval War College, Newport, RI: 7 May 1993.

Interview with CDR Eugene M. Pinkelmann, Jr., JAGC, USN, Operations Department, Naval War College, Newport, RI: 7 May 1993.

Letter from Senator Barbara A. Milulski to Charles Bowsher, Comptroller General of the U.S., 3 September 1992.

Meeks, Clarence I., III (Maj, USMC). "Illegal Law Enforcement: Aid Civil Authorities in Violation of the Posse Comitatus Act." Military Law Review, 1975, pp. 83-136.

Megargee, Richard A., Prof. Lectures on the Civil War and 20th Century U.S. Foreign Policy. U.S. Naval War College, Newport, RI: nd.

- Moore, Richter H., Jr. "Posse Comitatus Revisited: The Use of the Military in Civil Law Enforcement." Journal of Criminal Justice, Vol. 15, pp. 375-386.
- Mundy, Carl E., Jr. (Gen, USMC). "Remarks of General Carl E. Mundy, Jr., Before Congress." Marine Corps Gazette, April 1992, pp. 34-37.
- Naval War College Force Planning Faculty, ed. Fundamentals of Force Planning: Vol. II, Defense Planning Cases. Newport, RI: Naval War College Press, 1991.
- Newell, Clayton R. (LTC, USA). "What is Operational Art?" Military Review, September 1990, pp. 2-16.
- Operational Law Handbook (2nd Edition). JA 422 (Draft). Charlottesville, VA: Center for Military Law and Operations and International Law Division, U.S. Army Judge Advocate General's School, 1992.
- O'Shaughnessy, James P. "The Posse Comitatus Act: Reconstruction Politics Reconsidered." The American Criminal Law Review, vol. 13, pp. 703-735.
- Pines, Burton Yale. "The New World Order: Sense or Nonsense?" Lecture Transcript. Washington: The Heritage Foundation, 1991.
- Prina, L. Edgar. "Navy Moves 'All Ahead Flank' in Mine Warfare." Sea Power, May 1992, pp. 27-28.
- Rice, Paul Jackson (COL, USA). "New Laws and Insights Encircle the Posse Comitatus Act." Military Law Review, Spring 1984, pp. 109-138.
- Rolph, John (LCDR, JAGC, USN). "Civil Disturbance Rules of Engagement: Joint Task Force Los Angeles." U.S. Naval War College, Newport RI: nd.
- Secretary of the Navy. Posse Comitatus Act. SECNAVINST 5820.7. Washington: 1982.
- Shaver, David E. (COL, USA). Justifying the Army. Carlisle Barracks, PA: Strategic Studies Institute. Army War College, 1990.
- Taft, William H., IV. "The Role of DoD in Civilian Law Enforcement." Defense/83, March 1983, pp. 6-9.
- Telephone conversation with Maxwell Alston, Deputy Director for Emergency Planning, Office of the Deputy Undersecretary of Defense (Security Policy), Washington: 7 October 1992.

U.S. House of Representatives. H.R. 245. Washington: 1993.

_____. H.R. 1017. Washington: 1993.

U.S. Code, Title 10--Armed Forces. Washington: U.S. Govt. Printing Office, nd.

U.S. Code, Title 18--Crimes and Criminal Procedure. Washington: U.S. Govt. Printing Office, nd.

U. S. Navy Department. The Commander's Handbook on the Law of Naval Operations. NWP 9 (Rev. A). Washington: 1989.

_____. "...From the Sea: Preparing the Naval Service for the 21st Century." Washington: 1992.

Waghelstein, John D., Prof. "War: American Style." Lecture. U.S. Naval War College, Newport, RI: March 1993.

_____. "War: American Style." Session Syllabus, Joint Military Operations Course, Naval War College, Newport, RI: 1993.